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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
Appellants,
v.
CHRISTINE J. AMOS, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellants,
v.
CHRISTINE J. AMOS, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Utah

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the

Bishops in such diverse areas as education, family life, health and hospitals, social welfare, immigrant aid, poverty assistance, civil education, youth activities, and communications. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States, particularly when the Religion Clauses of the Constitution are implicated.

The Conference has a longstanding interest in the proper interpretation of the Religion Clauses of the first amendment. As *amicus curiae* in this Court, it has stressed the importance of applying the Clauses consistent with their generative history.[1] In this case, the district court ruled that a federal statute designed to mitigate involvement by the government in religion was unconstitutional under the Establishment Clause. Moreover, it invalidated the provision as if the statute affirmatively authorized action to advance religion in violation of the Clause.

The district court's ruling is not consistent with the historical purposes of the Establishment Clause. The statute insulates religious organizations from the regulatory machinery of the government in a limited area, employment of its own members in its activities. The Conference is concerned that, unless reversed, the district court's flawed Establishment Clause analysis will further derogate the meaning and interpretation of the Clause and lead to increased governmental involvement in the affairs of religious organizations.

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[1] In the last three terms, the Conference has appeared as *amicus curiae* in *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 106 S.Ct. 2718 (1986); *Bender v. Williamsport Area School District*, 106 S.Ct. 1326 (1986); *Aguilar v. Felton*, 105 S.Ct. 3232 (1985); and *School District of Grand Rapids v. Ball*, 105 S.Ct. 3126 (1985). The Conference extensively briefed the history of the Establishment Clause in *Mueller v. Allen*, 463 U.S. 388 (1983), and participated as *amicus curiae* in *Walz v. Tax Commission*, 397 U.S. 664 (1970), largely examining the historical treatment accorded tax exemptions.

Through their counsel, the parties consent to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

This Court has correctly insisted that the Establishment Clause be construed "according to what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).[2] If routinely a part of judicial review, that construction would substantially advance reasoned decision-making, giving the Clause its "natural and intended meaning . . . not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). In reviewing allegations that the Establishment Clause has been infringed, a court must determine the precise nature of the challenged action and the degree to which the government is responsible for that action. A court should invalidate the challenged action only when it is convinced the government has taken action that is clearly incompatible with the purposes and intent of the Clause as revealed through history and experience. In this case, the district court seriously erred in its application and interpretation of the Clause. *Amos v. Corporation of the Presiding Bishop*, 594 F. Supp. 791 (D. Utah 1984), *on subsequent hearing*, 618 F. Supp. 1013 (D. Utah 1985), *jurisdiction postponed*, 107 S.Ct. 396 (1986) (Nos. 86-179, 86-401).

At issue in this case is the congressional judgment, embodied in a provision of a federal employment statute, that federal regulatory authority should not police religious organizations in the employment of their own members in their activities. Section 702 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-1 ("section

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[2] The Religion Clauses of the first amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

702"). The Church of Jesus Christ of Latter-Day Saints ("Church") requires that its employees be or become members in good standing. Here, employees who would not or could not were discharged, and subsequently sued the Church. The Church defended by interposing the exemption provided in section 702. The district court held the provision unconstitutional as to one of the employees, asserting that it "authoriz[ed] . . . conduct which can directly and immediately advance religious tenets and practices." 594 F. Supp. at 825. Thus, Congress was held to have authorized the discharge on discriminatory religious grounds in contravention of the Establishment Clause. This conclusion does not withstand scrutiny.

In section 702, Congress authorized or condoned nothing; it simply declined to regulate a matter plainly within its discretion. *See United States v. Petrillo*, 332 U.S. 1, 8 (1947). Whether private religious organizations take actions that are discriminatory or not depends entirely on choices made in specific factual situations, and not on any generalized governmental action. When the Church in this case favored its own members, resulting in the discharge of the plaintiff employee, its actions did not implicate any constitutional provision. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982). Congress's refusal to regulate a particular private transaction does not suddenly transform that private action into governmental action. *Flagg Brothers v. Brooks*, 436 U.S. 149, 164-165 (1978); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972). In the present case, the injury complained of (discharge) resulted from the purely private choice of a private employer. The statutory provision neither authorized nor compelled that result; its effect is simply not to penalize a private decision of a religious organization. Most certainly, this does not involve any violation of the Establishment Clause, as it is authentically construed.

History teaches that the Establishment Clause was intended to deny to the new federal government the power

to prefer any religion over others. The Clause buttresses the Free Exercise Clause protections for religious liberty by denying to the government a specific way in which religious freedom had historically been infringed by action of the government. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961). Excessive state involvement in religious matters that tends to burden liberty impairs freedom of belief and practice. Such involvement is mitigated by the section 702 provision challenged here.

An absolutist approach to the Establishment Clause that would invalidate any statute through which a religious group may receive some benefit has been routinely rejected. *E.g., Lynch v. Donnelly*, 465 U.S. at 678. Instead, this Court scrutinizes the challenged action to determine whether, in fact, it tends to "establish" religion, as that term is precisely understood. *Id.* Looking at the statute as a whole, any advancement of religion from section 702 is incidental and indirect, resulting not from governmental action but rather from "genuinely independent and private choices." *Witters v. Washington Dep't of Services for the Blind*, —— U.S. ——, 106 S.Ct. 748, 752 (1986); *Mueller v. Allen*, 463 U.S. 388, 399, 400 (1983).

Moreover, in its Establishment Clause jurisprudence, this Court recognizes that the power to tax, like the power to regulate, can be an instrument of hostility toward religion. *E.g., Walz v. Tax Commission*, 397 U.S. 664, 673 (1970). An exemption minimizes encroachment by the state and promotes the "desired separation and insulation of government from religion." *Id.* at 675. Rather than violate the values embodied in the Establishment Clause, section 702 mitigates that which history and experience reveal should be guarded against—excessive involvement by the state in religion. The contrary judgment of the district court should be reversed.

ARGUMENT

THE ESTABLISHMENT CLAUSE IS NOT VIOLATED UNLESS THE STATE, AND NOT A PRIVATE PARTY, ACTS CLEARLY INCOMPATIBLY WITH THE CLAUSE'S PURPOSES AND INTENT. A STATUTE DESIGNED TO AVOID INVOLVEMENT OF THE STATE IN RELIGIOUS MATTERS IS CONSISTENT WITH THE CLAUSE.

The Constitution acts as a guide for and a restraint upon those actions undertaken by the government. With rare exceptions,[3] the Constitution does not reach private actions undertaken for private reasons, actions that when done by the government would violate the Constitution. *Rendell-Baker v. Kohn*, 457 U.S. at 837. Since 1964, as a matter of national policy, Congress has regulated the conduct of certain activities to eliminate discrimination based on race, color, sex, national origin, and religion. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* However, Congress provided a number of provisions limiting the reach of its anti-discrimination law, including one which restricts the scope of regulatory authority over religious organizations in matters involving the employment of their members. In section 702, Congress avoided a policy that would compel religious groups to accept non-members in their activities. 42 U.S.C. § 2000e-1;[4] Joint Explanatory Statement of

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[3] One example of forbidden private action is the thirteenth amendment's prohibition on slavery. *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 438-39 (1968).

[4] Prior to 1972, the religious exemption in Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-1 provided: "This subchapter shall not apply . . . to a religious corporation, association, [educational institution], or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, [educational institution], or society of its *religious* activities." Pub. L. No. 88-352, 78 Stat. 255, section 702 (1964). In 1972, the bracketed words were added, and the italicized word was deleted.

Conference Managers, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2179, 2180; 118 Cong. Rec. 4503 (1972) (remarks of Sen. Ervin).

Limiting federal regulation of religious organizations ensures that government will avoid certain involvements in religion. *Id.* Like tax exemptions, section 702, a regulatory exemption, promotes "the desired insulation and separation" of the state and religion. *See Walz v. Tax Commission*, 397 U.S. at 675. Contrary to the district court's ruling, the Establishment Clause does not demand regulatory involvement by the state in the affairs of religious groups.[5]

A. The Authentic Meaning of the Establishment Clause, Revealed by History and Experience, Is to Protect Religious Liberty by Denying to the State the Power to Prefer or Impermissibly Advance Religion.

As part of the Bill of Rights, the Establishment and Free Exercise Clauses were intended by the framers to be complementary and comprehensive protections for religious liberty. "[T]he Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government." *Wisconsin v. Yoder*, 406 U.S. at 214. The Establishment Clause reflects the experience of its framers that officially preferred or established religion generates religious intolerance and infringes personal liberty. *E.g., School District*

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[5] The concern of the Conference in this case is in rectifying the erroneous construction of the Establishment Clause adopted by the district court. It takes no position on the facts underlying the dispute at issue here.

of Abington Township v. Schempp, 274 U.S. 203, 221-22 (1963); *Torcaso v. Watkins*, 376 U.S. at 490.[6]

Responding to the express wishes of five States in their resolutions of ratification,[7] in the First Congress, James Madison introduced this version of what became the Religion Clauses of the first amendment:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

As Madison explained, the "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Congress* 730 (Gales & Seaton eds. 1789).[8]

The legislative debates evidenced little, if any, disagreement with these objectives. The Religion Clauses

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[6] As discussed in *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961), the colonists often created "the formal or practical 'establishment' of particular faiths in most of the colonies, with consequent burdens imposed on the free exercise of the faiths of non-favored believers."

[7] New Hampshire, New York, North Carolina, Rhode Island and Virginia specifically addressed the issue of religious freedom in their ratifying acts. Four states (New Hampshire excepted) also addressed the issue of a prohibition against an established religion, in terms of preferring one religion over others. I Debates on the Adoption of the Federal Constitution 328 (2d ed. J. Elliott ed. 1836) (New York), *id.* 334 (Rhode Island), III *id.* 659 (Virginia), and IV *id.* 244 (North Carolina). However, many including Madison believed that religion was not the province of the new government and that the religious diversity of the new country made preference politically untenable. III *id.* 330. *See generally* 1 *Annals of Congress* 731 (Gales & Seaton eds. 1789).

[8] *See id.* at 432-36. Madison also recited a popular fear that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 730-31.

that emerged from this process, however, were a House-Senate compromise.[9] The language finally selected satisfied the major objectives of the recommending states, as noted by Madison (*Annals, supra* at 432-36, 731), but respected the concerns of his peers.[10] The phrase "respecting an establishment" had two purposes, first to prevent Congress from establishing or favoring a national religion, and second to prevent Congress from interfering with state policies with regard to religion.[11]

The Religion Clauses were designed to protect religious liberty both by prohibiting interference in personal religious beliefs (both Clauses), and by specifically assuring that no religion could gain the special favor of the government, thereby subverting others (Establishment Clause). L. Whipple, *Our Ancient Liberties*, 66-68 (Da Capo ed. 1972). A prohibition of laws infringing the free exercise of religion would have been enough to mandate tolerance. Tolerance, however, could have meant that, although all could worship in peace, some religion

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[9] The history of the debates and the legislative compromise is extensively set forth in the opinion of the Chief Justice in *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 2510-2512 (1985) (Rehnquist, J., dissenting), and in the Conference's brief *amicus curiae* in *Mueller v. Allen, supra* note 1, Amicus Br. at 6-14, 22-24.

[10] Some participants in the debate expressed concerns about whether the new government would be national or federal. *Wallace v. Jaffree*, 105 S.Ct. at 2511. Moreover, others feared that the new government might interfere with the autonomy of states in religious matters, no small matter to those that maintained "established" churches. *See* Corwin, *The Supreme Court as National School Board*, 14 Law & Contemp. Probs. 3, 10 (1949).

[11] *Annals, supra* note 7, at 730-31. It was no mere coincidence that the leading actors in the House debates (except Madison) were from states with some degree of established religion. In this regard, Stokes argued that "respecting an establishment" was intended to confine the new Congress's regulatory power over religion. I A. Stokes, *Church and State in the United States*, 539-40. Stoke's view, like that of the Conference, was that the Religion Clauses were intended to offer protection *for* religion, not to be used as a lever *against* religion. *Id.* at 556.

might still be preferred by the state. Hence, the framers also denied to the new government the power of preference (note 8, *supra*), and thereby required equal treatment of all religions. *Id.* at 72.

The drafting process reflected the framers' experience with the historical realities of "establishment." A little more than half a century later, the Senate Judiciary Committee adverted to that experience when it rejected a petition urging that provisions for legislative and military chaplains should be abolished as an "establishment of religion." In its Report in 1853, the Committee explained that the phrase " 'establishment of religion' . . . referred, without doubt, to that establishment which existed in the mother country." S. Rep. No. 376, 32d Cong., 1st Sess. 1 (1853). It meant:

> the connexion [sic] with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances.

Id. This description provides a strong summary and important interpretation of the historical church-state involvement which led to the Establishment Clause. It is strikingly parallel to the description of the purposes and intent of the Clause that appears in *Lynch v. Donnelly*, 465 U.S. at 687-88 (O'Connor, J., concurring) and in *Larkin v. Grendel's Den*, 459 U.S. 116, 126-127 (1982).

B. Section 702 Avoids Involvement of the State in Religious Matters. It Tolerates a Range of Private Action and Does Not Itself Prefer or Impermissibly Advance Religion.

Section 702 operates simply to restrict governmental regulation of religious organizations in a limited area involving the employment of their own mombers. In ex-

ercising regulatory authority over religious organizations, Congress drew the line at employment decisions made on the basis of religion. It did, however, cover employment decisions based on race, sex and other grounds. In drawing the line, Congress chose to minimize the area of potential conflict between church and state, and did so in a way that did not violate the Establishment Clause. *See* 118 Cong. Rec. 4503 (1972) (remarks of Sen. Ervin). Section 702 authorizes nothing; it simply expresses Congress's choice not to regulate in a particular area.

The district court perceived matters differently. It acknowledged that Congress's purpose was to avoid conflict with religion [12] but ignored the real effect of section 702. Instead, it adopted uncritical *dicta* from another case [13] and held that the exemption had the "primary effect" of impermissibility advancing religion. *Amos v. Corporation of the Presiding Bishop*, *supra*, 594 F. Supp. at 823-825.[14] The district court stated that Congress could not

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[12] The district court found the Congress's desire to avoid potential conflict with religious groups to be a valid "secular purpose." *Amos v. Corporation of the Presiding Bishop*, 594 F. Supp. 795, 821 (D. Utah 1984). *See* note 14 *infra*.

[13] *King's Garden v. FCC*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). That case involved a challenge to an FCC license condition forbidding discrimination. The licensee contended that the FCC was bound to allow the exemption provided in section 702 of the Civil Rights Act. The court of appeals, through Judge Wright, summarily rejected the argument. Although the issue was not before the court, Judge Wright opined at length on the unconstitutionality of section 702, starting with the unsupported premise that Congress may not choose to limit the scope of its regulatory authority. 498 F.2d at 55 (*citing "Compare Reitman v. Mulkey*, 387 U.S. 369 (1967)"). *Reitman v. Mulkey* involved a state provision *intended* to authorize private discrimination. The district court in this case expressly found that, in enacting section 702, Congress intended to minimize regulatory conflicts with religious groups. *Supra* note 12.

[14] The district court chose to apply the three-part *Lemon v. Kurtzman* test for validity under the Establishment Clause. *See*

choose how to apply its regulatory authority. Once Congress chose to regulate, it must do so equally over the entire spectrum of businesses. *Id.* at 812, n.36, 821. Although there were no commercial competitors of the Church in the case, the court found the "effect" of section 702 "sponsored" religiously owned business activities over secular commercial rivals. *Id.* at 825.[15]

In summary, the court stated that, in effect, section 702 "authorize[d] . . . conduct which can directly and immediately advance religious tenets and practices." *Id.* In so concluding, the district court was analytically incorrect by insinuating the government into private conduct and misapplied this Court's rulings on the Establishment Clause.

1. *Section 702 Does Not Involve the Government in the Discharge Challenged Here. Without Action by the Government, There Is No Establishment Clause Violation.*

In this case, employees of Church-operated activities were discharged when they would not or could not become members in good standing. *Amos v. Corporation*

Larson v. Valente, 456 U.S. 228, 252 (1982). As stated in *Lemon v. Kurtzman*, the test is: "first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one which neither advances nor inhibits religion; and third, the statute must not foster excessive entanglement with religion." 403 U.S. 602, 612-13 (1971). The Conference's continuing difficulties with the application of the *Lemon* test and the uncritical use of elements of the test, discussed in its briefs (*supra* note 1) in *Ohio Civil Rights Commission v. Dayton Christian Schools*, *Bender v. Williamsport* and *Aguilar v. Felton*, are manifestly illustrated by the district court decision in this case.

[15] It is extremely unlikely that the plaintiff employees would have standing to raise the prospect of competitive injury to secular industries from section 702. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). Thus, the district court's assertion of competitive harm as a "primary effect" of section 702 should be treated for what it is—plain error.

of the Presiding Bishop, 594 F. Supp. at 796. Focusing on one employee discharge, the district court treated that purely private action as if it were affirmatively authorized by Congress, in violation of the Establishment Clause. *Id.* at 812, 821, 824. *Fike v. United Methodist Children's Home*, 547 F. Supp. 286, 291 (E.D. Va. 1982), *aff'd*, 709 F.2d 284, 286 (4th Cir. 1983).

The Clause (as discussed above at pages 9-10) was intended to protect religious liberty against government encroachment. Section 702 does not threaten anyone's religious liberty through the action of the government. Although the district court asserted that the plaintiff employee's liberty not to be a member of the Church was infringed, any infringement occcurred, if at all, from actions of the religious group and not from actions of the Congress. Congress did not compel or authorize the Church to act in any particular way; it simply declined to penalize a range of choices made for purely private reasons. *Compare Estate of Thornton v. Caldor*, 472 U.S. 703, 105 S.Ct. 2914, 2917 (1985), *with* section 702, *supra*, note 4. Without some governmental action, there can be no constitutional violation.[16]

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[16] As discussed below in argument B.2, the only governmental action involved here was in passing section 702, a provision that simply declined to extend Congress's regulatory power into a limited area of activity. Congress has the authority to regulate or not as a matter of legislative discretion. Absent plain constitutional infirmity, a court may not second-guess the wisdom or scope of a permitted legislative choice. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 518, 556-57 (1978). This is particularly so in regulation of activities under the commerce clause. As stated in *United States v. Petrillo*, 332 U.S. 1, 8 (1947): "[I]t is not within our province to say that because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power." *See United States v. Rodgers*, 466 U.S. 475, 484 (1984); *Evans v. Abney*, 396 U.S. 435, 447 (1970). Thus, the court of appeals in *King's Garden v. FCC*, *supra* note 13, erred in asserting that Congress must regulate equally in all directions once it chooses to regulate in one.

An important analogy may be drawn to the decisions of this Court on what constitutes "state action," for the purposes of establishing a claim for relief under 42 U.S.C. § 1983. "State action" is found in otherwise private action only where the government has "exercised coercive power or provided significant encouragement, overt or covert." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The receipt of significant government funding and the existence of pervasive regulatory power are not enough to convert private action into state action for liability purposes. *Rendell-Baker v. Kohn*, 457 U.S. at 838, *Jackson v. Metropolitan Edison*, 419 U.S. 345, 351 357 (1974). Most importantly, when a statute merely tolerates a range of private actions, including the one complained of, and does not directly involve the state in the act itself, there is no "state action." *Flagg Brothers v. Brooks*, 436 U.S. at 164. *See Moose Lodge v. Irvis*, 407 U.S. at 173, 179.

In *Flagg Brothers*, one private party sued another under 42 U.S.C. § 1983 to protest a sale of warehoused goods permitted under the Uniform Commercial Code. This Court rejected the argument that, by passing the statute allowing the protested sale, the state was now responsible for the actions of the private party. A failure to prohibit certain acts does not amount to authorization or encouragement for those actions. 436 U.S. at 165.[17] The private choice by Flagg Brothers to sell the warehoused goods was permited but not compelled by the statute. *Id.* Simply by making a permitted choice, a private party does not insinuate the government into that activity, which then becomes subject to constitutional scrutiny. *Evans v. Abney*, 396 U.S. 435, 445-46 (1970); *see Moose Lodge v. Irvis*, 407 U.S. at 173, 179. The same conclu-

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[17] Indeed, the Court stated even "acquiescence" is not enough to convert private action into state action. *Flagg Brothers v. Brooks*, 436 U.S. 149, 164 (1978), *citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 168, 170-71. (1970).

sion applies to choices permitted under a statutory exemption.

Section 702 does not in any way involve the government in making religious choices, much less discriminatory choices. What it does is render certain private choices not actionable under Title VII. The failure to preclude all forms of private discrimination and provide a federal remedy does not then convey the notion that the government endorses or encourages discrimination. *Evans v. Abney, supra.* In this case, the district court confused a refusal to regulate with authorization of purely private conduct. This Court should insist on direct government action, at a minimum, before the Establishment Clause is violated.

2. *Section 702 Does Not Impermissibly Prefer or Advance Religion in Violation of the Establishment Clause. It Insulates Religion from Certain Governmental Regulation.*

In *Lynch v. Donnelly*, the Court reaffirmed that the Establishment Clause should be interpreted "according to what history reveals was the contemporaneous understanding of its guarantees." 465 U.S. at 673. That history, recited above, reveals that the Clause was never intended to demand "hermetic separation." *Roemer v. Board of Public Works*, 426 U.S. 736, 745-46 (1976) (plurality). Merely because a statute arguably results in some advancement of religion does not mean it must automatically be invalidated. *Lynch v. Donnelly*, 465 U.S. at 678. Rather the legislation must be carefully scrutinized "to determine whether, *in reality*, it establishes a religion or religious faith, or tends to do so." *Id.* (emphasis added).

What the Court has forbidden is government "sponsorship, financial support, and active involvement" with religion. *Walz v. Tax Commission*, 397 U.S. at 668. What constitutes "sponsorship, support, or involvement" depends on the facts of a particular case. Moreover, there

is a "gray area" between the limits of the Establishment Clause and the commands of the Free Exercise Clause, what the Court has described as "*room for play in the joints* productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669 (emphasis added). Government may go further than that which is commanded by the Free Exercise Clause to accommodate religion without running afoul of the Establishment Clause. *Id.* at 673.[18] In this gray area, when the government only allows for independent religious choices, there is no invalidity under the Establishment Clause. *See Thomas v. Review Board*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting); *Sherbert v. Verner*, 374 U.S. 398, 422, 423 (1963) (Harlan, J., dissenting).

Section 702 plainly passes constitutional muster when the Establishment Clause is applied consistent with its historical purposes (discussed at pages 9-10, *supra*). It does not impermissibly prefer or advance any religion. A religious organization will simply not be penalized for choosing its own members in employment. The government is not involved in the employment decision. *Estate of Thornton v. Caldor*, *supra*. Simply because a statute may result in some advancement of religion *in a particular case* does not cause invalidity. Such a rule would defy "common sense and established precedent." *Witters v. Washington Dep't of Services for the Blind*, 106 S.Ct. at 754 (Powell, J., concurring). A court is required to decide whether, as a whole, the statute advances religion or simply allows private parties to make individual

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[18] That Congress may choose whether to include or exempt persons from a statute on religious grounds as an accommodation is well-established. *United States v. Lee*, 455 U.S. 252, 261 (1982); *Bowen v. Roy*, 106 S.Ct. 2147, 2158 (1986) (opinion of Burger, C.J.). That choice does not violate the Establishment Clause. *Id.*

choices for religious or other reasons. *Id.* at 752, 753; *Mueller v. Allen*, 463 U.S. at 397-400. Where advancement of religion occurs, not because of any governmentally authorized activity or sponsorship, but "only as a result of the genuinely independent and private choices . . .," there is no invalidity under the Establishment Clause. *Witters v. Washington Dep't of Services for the Blind*, 106 S.Ct. at 752.

Finally, section 702 shrinks the area of potential governmental conflict with religious groups, and is, therefore, within the range of actions permitted under this Court's decisions. The Court has recognized the power to tax historically had been and could be used to suppress religious activity. *Walz v. Tax Commission*, 397 U.S. at 673. For that reason, exemption from taxation was routinely provided for reliigous groups and would not, in any event, violate the Establishment Clause. *Id.*; *see Committee on Public Education, etc. v. Nyquist*, 413 U.S. 756, 793 (1973). Similarly, excessive regulation can have the same suppressive effect on private activity. *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *see Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.). Provisions such as section 702 reduce this possibility.

Thus, the Court has taken great pains to avoid governmental regulation of religious organizations unless clearly required by statute. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501, 504 (1979). Here Congress clearly and unambiguously provided that Title VII shall not apply to certain limited actions of religious organizations. Although an exemption may indirectly benefit religion in that it allows for unregulated private choices, section 702 in no way provides any purposeful illegal subsidy or support. *See Committee on Public Education v. Nyquist, supra.* On the other hand, the narrow interpretation of section 702 adopted by the district court would lead to enlarged government involvement in re-

ligion, a result inconsistent with the Establishment Clause. *Id.*; *Walz v. Tax Commission*, 397 U.S. at 675-76. An exemption minimizes involvement and promotes "the desired insulation and separation." *Id.* at 675.

Section 702 provides, at most, only an indirect benefit to religion. Any arguable "advancement" from the provision occurs when a religious organization chooses to favor one of its members in employment. Narrowing section 702, as the district court did, necessarily involves the state in determining what are the religious activities of religious organizations. This approach ignores the express congressional intent to minimize government involvement in religious matters, an intent wholly consistent with the barriers intended by the Establishment Clause for the preservation of religious liberty. As written by Congress, section 702 does not pose the same threat to the authentic purposes of the Clause as the district court's interpretation. That interpretation should be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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